

Because the Administrative Law Judge found claimant had failed to provide timely notice of accident, the Judge denied claimant's request for benefits. Claimant requests review of that finding and contends her date of accident is after November 15, 1994. Claimant argues she sustained a series of injuries after that date because she continued to work for the respondent and lifted on a daily basis the same postage meter she was lifting when she was initially injured. The issues now before the Appeals Board are: (1) the date of accident; and (2) whether claimant provided timely notice of accident to the respondent as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds:

The preliminary hearing Order of the Administrative Law Judge should be affirmed.

(1) The Appeals Board has the jurisdiction and authority to review these preliminary hearing issues pursuant to K.S.A. 44-534a.

(2) Claimant testified that on November 15, 1994 she lifted a postage meter in an awkward fashion and felt a very sharp pain and burning sensation in her right shoulder and right arm. Because she felt it was only a muscle pull, claimant did not initially tell her employer about the incident. Claimant continued to work for the respondent and continued to lift the postage meter on various occasions after the November accident.

Claimant first sought medical treatment in April 1995 when she consulted Kenneth Norton, M.D., who referred her on to orthopedic specialist Ben M. Kozikowski, M.D. Dr. Norton's office notes indicate claimant saw him on April 21 and April 28, 1995. In his office note of April 21, Dr. Norton writes that claimant had right arm and shoulder discomfort off and on for the last six months.

In Dr. Kozikowski's office notes dated May 24, 1995, he writes that claimant began having pain in the region of the right rotator cuff in approximately October when claimant lifted a 30-pound postage meter. He also notes that claimant initially experienced mild discomfort and thereafter progressively increased pain. In addition, he notes that claimant's pain has become almost continuous when she lays on her right upper extremity or uses it for even minor activities. At this visit, Dr. Kozikowski advised claimant to generally limit her activities, especially working with the arm above 90 degrees and to stop bowling. His impression was that claimant had impingement syndrome of the right shoulder, tendinitis involving the supraspinatus tendon of the shoulder, and a possible rotator cuff tear. After a period of conservative treatment, claimant underwent shoulder surgery in October 1995.

Claimant notified respondent of her work-related accident on May 24, 1995, the day she first saw Dr. Kozikowski.

Claimant alleged in her Application for Hearing filed with the Director's office on August 28, 1995 a date of accident from November 15, 1994 "and each and every day worked to present date." In her brief, claimant argued she sustained a series of accidents and injuries because she continued to lift a postage meter on a daily basis after the November 1994 accident. However, the evidence does not prove it is more probably true than not that claimant sustained additional injury after November 15, 1994 as a result of repetitive mini-traumas or otherwise. Because neither doctor addressed that issue in their office notes, we do not know whether the symptoms claimant experienced after November 1994 were the result of additional injury or whether they originated from the natural progression of the initial injury. Additionally, the record is unclear whether claimant lifted the postage meter on a daily basis, or otherwise, during the period she continued to work for the respondent after the accident.

Based upon the above, the Appeals Board finds the appropriate date of accident to be November 15, 1994, and that claimant has failed to prove that she provided timely notice of accident as required by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer entered in this proceeding on November 3, 1995 should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Peggy M. Crabtree, Overland Park, KS
Kenneth J. Hursh, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director